# Supreme Court of the United States

*THE SOUTH COVINGTON & CINCINNATI STREET RAILWAY COMPANY,*
*Plaintiff in Error,*

No. 252. *vs.*

*THE COMMONWEALTH OF KENTUCKY,*
*Defendant in Error.*

*THE CINCINNATI, COVINGTON & ERLANGER RAILWAY COMPANY,*
*Plaintiff in Error,*

No. 253. *vs.*

*THE COMMONWEALTH OF KENTUCKY,*
*Defendant in Error.*

## Reply Brief for Plaintiffs in Error.

We can not properly deal with these cases as if they involved the operation of an interurban line by the Erlanger company between Montague street in Covington, Kentucky, and Buttermilk Pike, four miles distant, also in Kentucky, and as if the cars of such interurban line

ran to Cincinnati by some arrangement with the South Covington & Cincinnati Street Railway Company.

The Erlanger Company did not own or operate any cars. The car upon whose operation this indictment and conviction were based, was a street car of The South Covington & Cincinnati Street Railway Company, operated as a part of the street railway system of that Company and making continuous interstate trips between Fountain Square in Cincinnati, Ohio, and the Buttermilk Pike, back of Covington, in Kentucky. The Statute (Sec. 795) applies only to Companies "operating" railroad lines or railroad cars, and the Erlanger Company, though not operating, was held by the court below to be guilty, because, as the owner of the right of way between Montague street and Buttermilk Pike, it was held to have consented to the alleged illegal operation, or to be jointly engaged therein with the Street Railway Company.

The proper way to approach these cases, therefore, is to determine first whether the application of the statute to the operation of the street car of the South Covington & Cincinnati Street Railway Company was in violation of the commerce clause of the Federal Constitution.

In considering this question, we must take the statute as a whole and assume that if the street railway company is required to furnish separate compartments for colored people, under Section 795, it will also be required to assign passengers thereto according to their color, under Section 799, which is a part of the same Act. It would be idle and futile to ignore the purpose and legal

consequences of requiring separate compartments, in determining whether such requirement is a burden on the interstate commerce described in this record.

While this indictment is not based upon an alleged violation of Section 799 requiring the segregation of passengers, but upon Section 795 requiring a separate compartment, the question whether the requirement of a separate compartment is a burden upon interstate commerce depends very definitely upon the use which the statute requires shall be made of it.

Let us assume as does our opponent, that the State of Kentucky can not require us to assign interstate passengers to the separate compartments. In view of the fact that eighty per cent. of the travel on that line is interstate, that not more than six per cent. of the whole travel is colored, and on many trips there are no colored passengers at all, we contend that the requirement to furnish separate compartments which would be seldom used, and would for the most part be wasted space, is of itself an undue burden upon interstate street car travel, where economical operation and the maximum of capacity, especially at rush hours, are required.

But an even more serious objection is to be found in the difficulties and complications which the very presence and maintenance of such separate compartments would produce in the conduct of the interstate business to which the line is principally devoted. Many of these difficulties are pointed out in our main brief, pp. 24 *et seq.*

Counsel for the state seem to realize the seriousness of these difficulties, for they seek to dispose of them in the following way, pp. 23 and 24 of this brief:

> "So far as this prosecution is concerned, there would be no violation of the law if this particular car in question had had the white compartment filled in Cincinnati with passengers of color, and the colored compartment filled in the same city with white passengers, and had permitted these passengers to ride through to the end of the line, if at the same time it had merely provided separate compartments designating the races to occupy them. In other words, it seems to us that all the inconveniences and burdens suggested by counsel in their brief arise from a conception that the prosecution is based upon a violation of the law of Kentucky requiring the company through its agents to assign the passengers. If this misconception is eliminated, and the fact merely is considered that the law simply requires the company to furnish separate compartments or coaches without reference to the duty of the company through its agents, to separate the races, all difficulties, it seems to us, disappear."

Of course the difficulties "disappear" in part at least if we assume after separate compartments are built and designated by signs, they will be occupied and used indifferently by white and colored people without separation. But we can not assume this in face of the plain requirement of the law as found in Section 799 of the same act.

But we must assume that the State of Kentucky will require the separation of Kentucky intrastate passen-

gers according to their color, and we contend that the burdens and difficulties of such requirement, and the maintenance of separate cars or compartments for that purpose are an unlawful burden on the interstate commerce described in the record.

As counsel for the State point out in their language above quoted, a car leaving Cincinnati might have white passengers in the colored compartment and colored passengers in the white compartment. If a colored passenger were taken into such car when it reached Kentucky and were assigned, as the law would require, to the colored compartment, when there were white people therein, or when other colored people were in the white compartment, the process would be a farce and would be attended with constant difficulty and danger of race antagonism and disorder.

As we have shown in our main brief, a still greater difficulty would be met on the northbond trips. A passenger boarding a northbound car is usually an interstate passenger, but there would be no way of ascertaining whether he was or not. Neither this street railway nor any other sells tickets for given stations. The passenger pays a flat fare of five cents, and rides as far as he likes. A colored passenger boarding a northbound car for a local trip, could easily declare himself bound for Cincinnati, thus evading assignment to the colored compartment, and then leave the car when he reached his real intrastate destination.

The suggestions made by opposing counsel as to practical methods of compliance with the law do not meet the difficulties.

Counsel say on page 25 of their brief:

> "It might, if it deems it more convenient to do so, operate its cars over the right of way of the Cincinnati, Covington & Erlanger Railway Company, to the terminus in Covington, on Montague street, or attach a separate car and there transfer its passengers to cars operating on the tracks of the South Covington & Cincinnati Street Railway Company."

If we understand this language it contains two suggestions.

First, that the south bound cars when they reach Montague street should take on another car for colored passengers and leave it on Montague street on the return trip. Aside from the burden of furnishing an additional car for an inconsiderable colored patronage for the very short distance involved, the suggestion is not practicable. The state could not require the interstate colored passengers to be transferred to such a car at Montague street, and any attempt to distinguish and transfer to such a car on reaching Montague street the colored passengers who had been taken up prior to that time within the State of Kentucky would be attended with obvious difficulties and complications. On the return trip from the southern terminus of the Erlanger line there would be the same difficulty of distinguishing between interstate and intrastate passengers to which we have already referred.

Second. The language quoted seems to contain the suggestion, which is also to be found on page 31 of the brief for the Commonwealth, that all passengers should be transferred at Montague street, that is to say, that the use of interstate cars on that part of the line should be abandoned.

As we have indicated in our main brief, that is what the enforcement of this law would probably mean in the case of this company, and the State of Kentucky has no right to bring about such a result, that is, to destroy, in the practical enforcement of its separate coach law, the continuous operation of interstate cars on this line.

It is not at all certain, however, that even such transfer of passengers and abandonment of interstate cars would avoid the embarrassments produced by the enforcement of this law, if any form of continuous trip, such as a single fare or a transfer, were retained. An interstate passenger boarding a car at either end of the line would be an interstate passenger for the entire trip, even though the trip were broken by a transfer to another car or were accomplished by the co-operation of two separate companies.

*Louisiana R. R. Commission* v. *T. & P. Ry. Co.*, 229 U. S., 336.
*Railroad* v. *Seale*, 229 U. S., 156.

This court in deciding the case of *Chesapeake & Ohio Railway Co.* v. *Kentucky*, 179 U. S., 388, recognized that an interstate carrier could not be required to furnish a separate coach or compartment unless there was some

practicable way in which the same could be reasonably utilized in compliance with that portion of the law which required the separation of colored passengers.

The court said on page 390:

> "Of course, this law is operative only within the state. It would be satisfied if the defendant, which operates a continuous line of railway from Newport News, Virginia, to Louisville, Kentucky, should take on its westward bound trains a separate coach or coaches for colored people at its first station in Kentucky, and continue the same to Louisville; and upon its eastward bound trains take off such coach at the same station before leaving the state."

The distinction between the facts in that case and the facts in this case have already been pointed out.

We have shown the impracticability of attaching a separate car to the interstate car after it crosses the state line and in the midst of a trip whose total length is six miles.

In the case of a steam railroad with the interstate trains making long journeys, with trains always composed of several cars, with engines always having capacity to draw additional cars, with cars of sufficient length to make the establishment of separate compartments easy, with passengers automatically classified by their purchase of tickets, with stations or junction points near the state line where there are facilities for the change and addition of equipment, the situation is entirely different.

We submit that a state statute or regulation which operates upon interstate commerce, or which is interpreted by the state in such a way as to make it operate on interstate commerce is on the defensive, so to speak, and to be upheld it must be entirely and affirmatively reasonable.

The regulation of interstate commerce is the domain of the Federal Government. A state statute which, as interpreted in a given case, regulates or burdens interstate commerce does not have the presumption in its favor which attends public regulations in general.

In *Atlantic Coast Line* v. *Riverside Mills,* 219 U. S., 186, this court upheld the validity of the Carmack Amendment, a federal enactment, making any common carrier receiving property for interstate transportation over its own and another line, liable for any loss or damage by the connecting carrier. It was claimed that the law was arbitrary and unreasonable and therefore beyond the power of Congress, but the court held that it was within the power of Congress under the interstate commerce clause of the Constitution.

In *Central Georgia* v. *Murphy,* 196 U. S., 134, a similar law of the state of Georgia, which was not so rigorous as the Carmack Amendment, was held, when applied to interstate commerce, "not a reasonable regulation in aid of interstate commerce but a direct and immediate burden upon it."

The freedom from interference by state laws, to which interstate commerce is entitled, is not merely freedom

from regulations of confiscatory or oppressive character; it is entitled to freedom from any substantial interference. As this court said in *Welton* v. *Missouri*, 91 U. S., 292, it is entitled, in the absence of action by Congress, to "remain free and untrammeled."

In *Ill. Central R. Co.* v. *Illinois*, 163 U. S., 142, 154, the court said:

> "The state can do nothing which will directly burden or impede the interstate traffic of the company, *or impair the usefulness of its facilities for such traffic.*" (Italics ours.)

This language was quoted with approval in *Kansas City S. R. Co.* v. *Kaw Valley Drainage District*, 233 U. S., 75.

We submit that the separate coach act of Kentucky as applied in this particular case, imposes a serious burden upon the operation of the interstate cars, and upon interstate commerce; that it violates the Commerce Clause of the Federal Constitution; and that the judgments herein should be reversed.

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# LIST OF CASES

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**In Error to the Court of Appeals of the State of Kentucky.**

## Brief for Defendant in Error.

### STATEMENT

These are proceedings in error to reverse the Court of Appeals of Kentucky, which affirmed judgments of the Kenton Circuit Court, overruling demurrers to indict-

ments brought against plaintiffs in error, for a violation of the separate coach law of Kentucky.

*The Cincinnati, Covington & Erlanger Railway Company* is a corporation organized under the general railroad laws of Kentucky. *The South Covington & Cincinnati Street Railway Company* is a corporation created by a special act of the Kentucky Legislature, and authorized to operate a street railway. The date of the charter of the *Cincinnati, Covington & Erlanger Railway Company* is September 18, 1899. Very shortly thereafter, this company, by virtue of its charter, proceeded to condemn for railroad purposes, a right of way between the western boundary line of Covington, Kentucky, and a point about three miles Southwest of Covington. Afterwards the same company, acting under its powers as a railroad company to condemn land, extended its line of railway to a point near the Buttermilk Pike, about four miles from the western boundary line of Covington.

*The South Covington & Cincinnati Street Railway Company* was, during this period, operating its line of railway in the City of Covington, and into the adjoining cities of Newport, Kentucky, and Cincinnati, Ohio. It owned a power house, rolling stock and all the necessary equipment for the operation of a line of electric railway. There was at this time, a practical identity of directors and officers of both companies (Record Case 757, Pp. 21-27). When the road of the *Cincinnati, Covington & Erlanger Railway Company* was completed, the *South Covington & Cincinnati Street Railway Company* connected its tracks with the terminus of this company in Covington and began to operate its cars over the road. So complete was the identity of the personnel of the two companies, that

apparently no formal contract was made between them with reference to this operation. At all times there existed a common treasury, common officers and offices, the only distinction between the two companies being that each maintained a separate corporate existence.

By separate indictments, plaintiffs in error were charged with the violation of Section 795 of the Kentucky Statutes, which requires railroad companies, or other corporations or persons operating a railroad car, or coaches, by steam or otherwise, within the State to furnish separate coaches or cars for white and colored passengers, and which further provides that each compartment of a coach divided by a substantial wooden partition shall be deemed a separate coach within the meaning of the act.

In the Circuit Court, where both cases were heard together, a verdict of guilty was returned against both companies and upon appeal the Court of Appeals affirmed both judgments (Case 757, Assignment of Errors, Rec., Pp. 56).

It was contended that the Statute of Kentucky as applied to the facts in this case, was an unlawful and unreasonable interference with interstate commerce, in violation of the federal constitution. (Case 757 Rec., Pp. 7, 44.) This defense was decided by the Kentucky Court of Appeals, adversely to plaintiffs in error.

While the same facts are involved in both appeals, we think it more logical to first discuss the indictment against the *Cincinnati, Covington & Erlanger Railway Company*, upon whose guilt depends the guilt of the *South Covington & Cincinnati Street Railway Company*.

It will be noticed that the charter of the *Cincinnati, Covington & Erlanger Railway Company* authorizes it to

construct, maintain and operate a line of railway "not exceeding ten miles in length" (Case 757 Rec., Pp. 16.), "from the City of Covington, Kenton County, Kentucky, to the Town of Erlanger, in Kenton County, Kentucky, and to such point in said Town of Erlanger as may be hereafter determined upon." (Case 757 Rec., Pp. 17.). The charter is the usual railroad charter.

In 1902, Sec. 842-a, paragraph 1, of the Kentucky Statutes was enacted. This Section is as follows:

> Section 842-a. 1. Interurban electric railroads placed on same footing as railroads. All interurban electric railroad companies authorized to construct a railroad ten or more miles in length, heretofore or hereafter incorporated under the general railroad laws of this Commonwealth, shall be under the same duties and responsibilities, so far as practicable, and shall have the same rights, powers and priviliges as *is* now granted to or conferred upon railroad, corporations existing, operated or incorporated under existing laws of this Commonwealth, or under laws that may hereafter be enacted.

Evidently the author of the Section had in mind the peculiar provisions of the charter of the *Cincinnati, Covington & Erlanger Railway Company*, for this company was in fact "an interurban electric railroad" company "authorized to construct a railroad ten miles in length," and "incorporated under the general railroad laws" of the Commonwealth of Kentucky.

## THE LAW

The indictment was had under Sections 795 to 798, of the Kentucky Statutes, which are as follows:

Section 795. *Separate coaches or compartments for white and colored passengers.* Any railroad company or corporation, person or persons, running or otherwise operating railroad cars or coaches, by steam or otherwise, on any railroad line or track within this State, and all railroad companies, person or persons, doing business in this State, whether upon lines of railroad owned in part or whole, or leased by them; and all railroad companies, person or persons, operating railroad lines that may hereafter be built under existing charters, or charters that may hereafter be granted in this State, and all foreign corporations, companies, person or persons, organized under charters granted, or that may be hereafter granted by any other State, who may be now, or may hereafter be, engaged in running or operating any of the railroads of this State, either in part or whole, either in their own name or that of others, are hereby required to furnish separate coaches or cars for travel or transportation of the white and colored passengers, on their respective lines of railroad. Each compartment of a coach divided by a good and substantial wooden partition, with a door therein, shall be deemed a separate coach within the meaning of this act, and each separate coach or compartment shall bear in some conspicuous place appropriate words in plain letters indicating the race for which it is set apart.

Section 796. *No discrimination in coaches or compartments.* That the railroad companies, person or persons, shall make no difference or discrimination in the quality, convenience or accommodations in the cars or coaches or partitions set apart for white and colored passengers.

Section 797. *Misdemeanor-Penalty.* That any railroad company or companies that shall fail, refuse, or neglect to comply with the provisions of Sections 795 and 796 shall be deemed guilty of a misdemeanor, and, upon indictment and conviction thereof, shall be fined not less than five hundred nor more than one thousand five hundred dollars for each offense.

Section 798. *Jurisdiction of circuit courts.* That all circuit courts in which railroads are operated in this State shall have complete jurisdiction over such offenses.

Counsel for plaintiffs in error have incorporated in their brief Sections 799 to 801 of the Kentucky Statutes, which make it the duty of the person in charge of trains to assign white and colored passengers to their separate coaches or compartments, and providing a penalty for his failing to do so.

This is not a proceeding against the conductor of a railroad company for a violation of the law requiring the company, through its agents, to assign passengers to coaches or compartments, set apart for persons of their race. It is a proceeding against the companies for failing to provide, within the Commonwealth of Kentucky, coaches or compartments of equal convenience and accommodation for white and colored passengers. We assume that the distinction is apparent. Conceding for the purpose of the argument, that the car mentioned in these indictments, and described in the proof, was an interstate car, it might be said that an attempt to compel the company, through its agents, to assign interstate passengers to separate compartments, as soon as the car crossed the boundary line between Kentucky and Ohio, would be an unlawful and unreasonable burden upon interstate commerce. We are not concerned with that proposition at this time, however, because this Court has frequently held, even with reference to interstate carriers, that it is no unlawful and unreasonable burden upon interstate commerce, to require the carrier, while operating its train or cars between two points, within the State.

to furnish suitable and convenient separate compartments for the use of the white and colored races.

The Commonwealth has not considered it important to determine whether Section 795 to 798 would apply to the plaintiffs in the absence of Section 842-a, paragraph 1, or whether the enactment of Section 842-a, paragraph 1, of the Kentucky Statutes was necessary to bring the *Cincinnati, Covington & Erlanger Railway Company* within the operation of the separate coach Statute. As a matter of fact, we would contend that if Sec. 842-a, paragraph 1, had not been enacted, the *Cincinnati, Covington & Erlanger Railway Company*, being a railroad corporation organized under the general railroad laws of the Commonwealth, would have been subject to the operation of the separate coach Statute. Certainly, however, under one of the Statutes, or both, the *Cincinnati, Covington & Erlanger Railway Company*, is subject to the separate coach law. It is conceded that the foregoing Statutes do not apply to a street railway. The Court of Appeals of Kentucky has held however, in *Louisville Railway Company v. Commonwealth*, 130 Kentucky, page 738, that the separate coach law applies to a street railway company leasing and operating interurbans.

## THE INDICTMENTS

The indictment against the *Cincinnati, Covington & Erlanger Railway Company* is to be found on pages 1-4 inclusive, of the record, in case No. 758, and charges the company with operating a line of railroad within the Commonwealth of Kentucky, and Kenton County, without providing separate coaches or compartments for white

and colored passengers. It charges that the company was incorporated under the general railroad laws of the State, and authorized to construct a line of railroad ten miles in length in the County and State aforesaid. That it had leased its rights and privileges to, and brought about the acquisition of its rights and privileges by the *South Covington & Cincinnati Street Railway Company*, to operate its line of railroad, with the knowledge that the *South Covington & Cincinnati Street Railway Company* would not operate and run separate coaches, or provide separate compartments for its white and colored passengers. That the *Cincinnati, Covington & Erlanger Railway Company*, by virtue of its acquisition of these rights by defendant company, knowing the intended method of operation by the *South Covington & Cincinnati Street Railway Company*, did, in February, 1915, operate a line of railroad and run a railway coach on its line of railroad, between two points in Kentucky, one being in the City of Covington, and the other being at a point near the Buttermilk Pike, without having provided separate coaches or compartments for white and colored passengers.

The indictment against the *South Covington & Cincinnati Street Railway* is to be found on pages 1-3 of the record in case No. 757, and charges that the *Cincinnati, Covington & Erlanger Railway Company* is an interurban railway company, authorized to construct a line of railroad ten miles in length, within the State of Kentucky, and incorporated under the general railroad laws of the Commonwealth of Kentucky. That the *South Covington & Cincinnati Street Railway Company* acquired the rights and privileges of the *Cincinnati, Covington & Erlanger Railway Company* to operate said line of railroad between

two points in Kenton County, Kentucky, and did run, operate and control the line of railroad of the *Cincinnati, Covington & Erlanger Railway Company*, and did operate a railway coach or car between two points in Kentucky, to-wit: One in the City of Covington, and the other on the Lexington Pike near the Buttermilk Pike, without providing a separate coach or compartment for white and colored passengers.

## CLAIM OF PLAINTIFFS IN ERROR.

Under this heading, counsel for plaintiffs in error have called the Court's attention to and laid some stress upon the fact that the car mentioned in the proof was an interstate car, operated by the *South Covington & Cincinnati Street Railway Company*, a street railway company. We think this proposition not important if it was operating this car for a railroad company and over a railroad line. The *Cincinnati, Covington & Erlanger Railway Company* is organized under the general railroad laws of the Commonwealth of Kentucky, subject to all the railroad laws of the Commonwealth, and this has been held by the Court of Appeals of Kentucky upon more than one occasion.

In the case of *Devou v. Cincinnati, Covington & Erlanger Railway Company*, reported in 128 Ky. 768, this Court held that:

> Appellee is a railroad corporation organized under the laws of Kentucky for the purpose of constructing and operating an electric railway from Covington to Erlanger and other points beyond, not exceeding ten miles in distance, from Covington.

It was claimed by Devou, as the company now claims, that the *Cincinnati, Covington & Erlanger Railway Company* was a street railway company. On this proposition, the Court said:

> It only remains to be determined whether appellee is a railroad that may condemn land as provided by Section 835 Ky. St. 1903. It will hardly be questioned that appellee's articles of incorporation authorize it to construct and operate a railroad, and to that end to run over, along, and upon "such bridges, streets, roads, highways, and such private property, as such company, may by due process of law, acquire the right to lay its tracks and other appliances and appendages upon." While the term "railroad," as used in Section 835, Kentucky Statute 1903, has not been construed by this Court, we are clearly of opinion that the word "railway" has the same meaning. The words "railway, transfer, belt line," and "railway bridge companies," are used in Sections 214, 215 and 216 of the Constitution; and this Court has held that the provisions of Section 216 of the Constitution embrace street railroads as well as steam railroads. The language of that section is as follows: 'All railway, transfer, belt line and railway bridge companies, shall allow the tracks of each other to unite, intersect and cross at any point, where such union, intersection and crossing is reasonable or feasible.' In passing upon the question of whether a street railway in process of construction between Ashland and Catlettsburg, a distance of four miles should be allowed to cross a steam railroad at grade in Ashland as provided by Section 216, Const., this Court said: 'It is urged, however, that the appellee (street railway) is not a railway company in the meaning of the section of the Constitution quoted. We think, whatever may be said of street railways in general, that the charter of this company puts it in the class indicated by that section. The railway was to connect two cities. It might use steam, horse or other propelling

> power on said car route in the transportation of freight and passengers.' *Elizabethtown, etc., Railroad Co. v. Ashland, etc., Street Railway Co.*, 96 Ky. 347, 26 S. W., 181; *Johnson's Admr. v. Louisville City Railway Co.*, 10 Bush., 231; *L. & N. Railroad Co. v. Bowling Green Railway Co.*, 110 Ky. 788, 63 S. W. 4. The appellee railway, like the Ashland Railway Company mentioned in the case, supra, is of the class indicated by Section 216 of the Constitution, as it is to connect two cities, may carry freight, as well as passengers, and use steam instead of electricity, steam being one of the 'improved' methods of rapid transit.' While appellee's cars pass through Covington to Cincinnati and return, its railway is not, strictly speaking, a street railway, but rather an interurban electric railway, which is, or may be, operated a distance of ten miles from Covington and beyond Erlanger.

In the case of *Commonwealth v. Louisville & Eastern R. R. Company*, 141 Ky., 583, the Court of Appeals of Kentucky reversed a holding of the Circuit Court that Section 786 of the Kentucky Statutes, providing that a bell must be rung, or whistles sounded at crossings, did not apply to electric railways.

The Court said:

> We cannot agree with this view of the case. A locomotive engine is not necessarily a steam engine. Any engine used in producing motion, whether it be by steam or electricity, is a locomotive engine within the meaning of the Statute. Furthermore, Section 842-a was intended to bring interurban electric railroad companies under the law governing railroad corporations generally, both as to duties and rights, insofar as it was practicable to do so. The statute recognized the fact that there might be some instances in which regulations originally applicable to steam railroads could not be made practicable in all respects and applied to electric railroads. But

this condition was expressly provided for by the language of the statute which made such regulation apply to electric railroads, so far as it was practicable. If the regulation is capable of being complied with by an interurban electric railway company with its available means or resources, either in whole or in part to that extent it is practicable and must be complied with. And in determining the question of the practicability of the regulations, we are not to be restricted to a consideration of instruments or methods identical with those specified in the statute originally applicable to steam railroads; for if any substitutes or improvements in locomotive engines have been adopted to accomplish the same general purpose of the engine, the company must still obey the regulation in so far as the new condition made it practicable. It could scarcely be contended that a railroad company which had heretofore propelled its engine by steam could avoid the provisions of Section 786 supra, by changing its motive power to electricity.

In the case of *Louisville Railway Company v. Commonwealth*, and *Louisville Interurban, etc. v. Commonwealth*, 130 Ky., 738, to which reference will again be made, it was held that an interurban company is required to furnish separate coaches.

The offense charged in the indictments is the failure to furnish separate coaches or compartments between two points in Kentucky. The fact that the *Cincinnati, Covington & Erlanger Railway Company* permits another company, the *South Covington & Cincinnati Street Railway Company*, to operate cars beyond these points, and into another state, can not be relied upon by the plaintiff in error to escape liability. Neither is it material that the cars operated at the time the record was made in the Kenton Circuit Court, were, as suggested by counsel, in

their brief, about 21 feet in length. The Court knows at the present time that many street railways and interurbans operate large double truck cars nearly approaching in size the coaches used by steam railroads a few years ago. Neither is it material and the Court below so held that 6% of the passengers carried were colored, and that on a large number of trips no colored persons were carried. (*C. & O. R. R. Co. v. Commonwealth; L. & N. R. R. Co. v. Commonwealth*, 171 Ky. 355), 119 Ky. 519. If there were something in the charter of the *South Covington & Cincinnati Street Railway Company* which required it to operate a single truck car, seating only 32 passengers, and preventing it from operating large double truck cars with trailers, it might be conceded for the purpose of the argument, that the prosecution for failure to partition off these small cars would be an unreasonable interference with interstate commerce. In this case the law would be complied with, however, if the *South Covington & Cincinnati Street Railway Company*, at the point near the western boundary line of Covington, where it connects with the tracks of the *Cincinnati, Covington & Erlanger Railway Company*, would attach a trailer, so that separate coaches would be provided while the operation was over the tracks of the *Cincinnati, Covington & Erlanger Railway Company*.

The Court of Appeals held not as counsel states, that the *Cincinnati, Covington & Erlanger Railway Company*, was "theoretically" an interurban line, but that it was actually and properly an interurban line, within the meaning of the separate coach act. The Court held further:

"It is very clear that the *Cincinnati, Covington & Erlanger Railway Company*, being an interurban railroad, with authority under its charter to build electric railroad, ten miles in length, if operating its own railway would be amenable to the requirements of Section 795 supra, 842-a, Kentucky Statutes.

The Court further said:

In *Louisville Railway Company v. Commnowealth*, 130 Ky., 738, discussing as to what railroads, Section 795, supra, were applicable to, it was said: 'But interurban railroads are required by law to do so (to furnish separate coaches for white and colored passengers) and they can not evade the performance of this duty by leasing or otherwise turning over the use of their lines to a street railway or other railroads.' In *L. & N. R. R. Co. v. Commonwealth*, 120 Ky., 91, this Court, discussing the obligations of railroad corporations, generally said: 'But in any event appellee can not be permitted to escape the performance of any duty or obligation imposed by its charter or the general laws of the state by transferring its road or any part thereof to a lessee.' Hence so long as the *Cincinnati, Covington & Erlanger Railroad* continues to be an interurban railroad, the persons or company operating railroad coaches upon it, are amenable to the requirements of Section 795 supra, and the corporation, itself if it authorizes any other person or company to operate the railroad, contrary to such statute, will be amenable to punishment under it. (*Louisville Railway Company v. Commonwealth*, supra.)

In other words, the Court of Appeals of Kentucky held that this car was an interurban car, and actually operated as an interurban which, of course, is not a federal question, and which construction of the State Statute this

Court will adopt. The federal question involved is, whether or not there was a burden upon, or an illegal regulation of, the interstate buisness of this car. The Court of Appeals of Kentucky simply held that the *Cincinnati, Covington & Erlanger Railway Company*, while operating in Kentucky between points in Kentucky only, was required to provide separate accommodation for white and colored passengers.

We are familiar, of course, with the principles announced in *Mississippi Railroad Commission v. Illinois Central Railroad Company*, 203 U. S., 335, and *Southern Pacific Company v. Schuyler*, 227 U. S., 601, to the effect that it may become necessary to examine the facts upon which the decision of the State Court rests, to determine whether or not there has been an unconstitutional exercise of power, but we submit that no federal right has been denied, as a result of the finding of fact in this case, that this car in its method of operation, was an interurban car.

All the cases cited by counsel under this heading, *Chicago, Burlington & Quincy Railroad Co., v. Railroad Commission of Wisconsin*, 237 U. S., 220; *Sea Board Air Line Railway Co., v. Blackwell*, 244 U. S., 310; *Missouri, Kansas & Texas Railway Company v. State of Texas*, 245 U. S. 484, refer to the method of operation of interstate trains. Requiring an interstate train to stop at a certain point, might or might not be an illegal burden upon interstate commerce, depending upon the reasonableness of the order, but it has never been held that separate coach laws, applying only to the operation of trains, within the State, have been such a burden.

## THE FACTS

Under the above heading counsel for plaintiffs in error have abstracted a part of the testimony taken in these cases, some of which tends to show that some branches of the State government in matters of taxation, treated the *Cincinnati, Covington & Erlanger Railway Company* as a street railway and not an interurban line. Whether this testimony was material, or not, at the time it was taken, it is certainly not material now, because the Court of Appeals of Kentucky has disposed of this matter by finding as a fact that this *Cincinnati, Covington & Erlanger Railway Company* was an interurban company, and that the car operated over its line of railway was an interurban car. The question here now is, not whether or not the *Cincinnati, Covington & Erlanger Railway Company* was an interurban car, but whether or not the application of the separate coach law to this company's method of operation of its cars, under the facts in the case, was an unlawful interference with interstate commerce.

## THE CINCINNATI, COVINGTON & ERLANGER RAILWAY COMPANY AND THE SOUTH COVINGTON & CINCINNATI STREET RAILWAY COMPANY ARE BOTH GUILTY OF A VIOLATION OF THE SEPARATE COACH LAW.

The testimony shows (Case No. 757, Rec., Pp. 21-30), that there was an intimate association, if not identity between the two companies. They had the same directors and practically the same officers. Both companies occupied the same offices and were under the same general

management, and at all times the directors and officers of one company were familiar with the affairs of the other. That the *South Covington & Cincinnati Street Railway* became the owner of all the stock of the *Cincinnati, Covington & Erlanger Railway Company*, except the qualifying shares of the directors of the latter company, and in a word, that their association was so intimate, that it was not thought necessary to put any contract on record with reference to the operation of the *South Covington & Cincinnati Street Railway's* cars over the line of railroad of the *Cincinnati, Covington & Erlanger Railway Company*. Upon the authority of the *Louisville Railway Company v. Commonwealth*, and *Louisville Interurban Railroad v. Commonwealth*, 130 Ky., 738, the Court of Appeals of Kentucky held in this case as follows:

> It is contended that the *South Covington & Cincinnati Street Railway Company* is authorized by its charter to operate a street railroad upon the road of the *Cincinnati, Covington & Erlanger Railway Company*, but an examination of the charter does not seem to justify this contention, and if authorized to operate the line, not being a street railroad, it would be required to comply with the statute in its operation. It is very clear that the *Cincinnati, Covington & Erlanger Railway Company* being an interurban road, with authority under its charter to build an electric railroad ten miles in length (*Devon v. Cincinnati, Covington & Erlanger Railroad Company*, supra), it, if operating its own railway, would be amenable to the requirements of Section 795, supra, (Section 842-a Ky. Stat.). In *Louisville Railway Co. v. Commonwealth*, 130 Ky., 738, 114, S. W. 343, 132, Am. St. Rep., 408, discussing as to what railroads Section 795, supra, was applicable to, it was said: 'But interurban railroads are by law required to do so (to furnish separate coaches for white and colored passengers), and they can-

not evade the performance of this duty by leasing or otherwise turning over the use of their lines to a street railway or other railroad.'

In *Commonwealth v. L. & N. R. R. Co.*, 120, Ky. 91, 85 S. W., 712, 27 Ky. Law. Rep., 497, this Court, discussing the obligations of railroad corporations, generally, said:

"But, in any event, appellee cannot be permitted to escape the performance of any duty or obligation imposed by its charter or the general laws of the state by transferring its road, or any part thereof, to a lessee."

Hence so long as the *Cincinnati, Covington & Erlanger Railroad* continues to be an interurban railroad, the persons or company operating railroad coaches upon it are amenable to the requirements of Section 795 supra, and the corporation itself, if it authorized any other person or company to operate the railroad contrary to such statute, will be amenable to punishment under it. *Commonwealth v. Louisville Railway Company*, supra.

## THE CINCINNATI, COVINGTON & ERLANGER RAILWAY COMPANY IS NOT ENGAGED IN INTERSTATE COMMERCE.

The Court of Appeals in its opinion affirming these cases, said:

Neither is the statute, supra, when applied to the indictments and evidence in these cases an unreasonable interference with or regulation of interstate commerce and violation of the commerce clause of the federal constitution. Each of the termini as well as all the stations of the *Cincinnati, Covington & Erlanger Railway Company's* road is within the State of Kentucky. The operation of a train upon this road, while it may be extended into another state, by connecting it

with and operating it upon the track of another company, the fact yet remains that it is operated the entire length of the line of the *Cincinnati, Covington & Erlanger Railway Company*, in the State of Kentucky. The offense charged and for which the defendants were convicted was the operation of the railroad in an unlawful manner within the State, and in violation of one of the measures enacted under the police powers of the State. *L. & N. R. R. Co., v. Commonwealth*, 171 Ky., 355, 188 S. W., 394, supra. The holding of this Court in *Chiles v. C. & O. R. R. Co.*, 125 Ky., 304, 101 S. W., 386, 30 Ky. Law Rep., 1332, 11 L. R. A. (N. S.) 268, with regard to the application of the statute under consideration to the transportation of an interstate passenger, is adhered to, and not overlooked.

The section of the statute under which this prosecution is brought does not require the company, or its agents, to assign white and colored passengers to separate compartments. It merely requires that the company, between Montague Street, in the City of Covington, Kentucky, and a point on the Lexington Pike, a few miles outside of the City, and in the same State, shall provide upon its cars suitable and convenient compartments for the two races. So far as this case is concerned, we may concede that a passenger who got upon a car in Cincinnati, to ride to the end of the line, could not be assigned to the compartment set apart to his race, after the car had reached the tracks of the *Cincinnati, Covington & Erlanger Railway Company*. If the company had provided this car with a partition with removable signs, designating the race to occupy the compartments, it would comply with the law by merely posting these signs in Kentucky and removing them in Ohio. So far as this prosecution is concerned, there would be no violation of the law if this particular

car in question had had the white compartment filled in Cincinnati with passengers of color, and the colored compartment filled in the same city with white passengers, and had permitted these passengers to ride through to the end of the line, if at the same time it had merely provided separate compartments designating the races to occupy them. In other words, it seems to us that all the inconveniences and burdens suggested by counsel in their brief arise from a conception that the prosecution is based upon a violation of the law of Kentucky requiring the company through its agents to assign the passengers. If this misconception is eliminated, and the fact merely is considered that the law simply requires the company to furnish separate compartments or coaches without reference to the duty of the company through its agents, to separate the races, all difficulties, it seems to us, disappear. Of course, there will always exist practical difficulties in the operation of railroads and street car lines in compliance with the law. In the case of the *South Covington & Cincinnati Street Railway Company v. City of Covington*, 235 U. S., page 537, in a prosecution against the same company for failing to comply with a city ordinance, the company claimed that it was an interstate carrier and that the ordinance was an unreasonable interference with interstate commerce. This Court sustained the position of the company with reference to certain parts of the ordinance, but held as follows:

> There are other parts of the ordinance which we are of the opinion are within the authority of the state and proper subject matter for its regulation; at least until the federal authority is exerted. These are the provisions with reference to passengers riding on the rear platform unless

> the same be provided with a suitable rail or barrier, etc., and as to persons riding upon the front platform unless rail or barrier be provided separating the motorman from the balance of the front platform, as well as those provisions with reference to the requirements to keep the cars clean and ventilated and fumigated. We think these regulations come within that class in which this Court has sustained the right of the local authorities to safeguard the traveling public, and to promote their comfort and convenience, only incidentally affecting the interstate business and not subjecting the asme to unreasonable demands.

It must be remembered that it was not necessary for the *Cincinnati, Covington & Erlanger Railway Company* to organize under a railroad charter, for, according to counsel's contention, the *South Covington & Cincinnati Railway Company* had the right to build street railways outside of the City. But the *Cincinnati, Covington & Erlanger Railway Company* has voluntarily assumed incorporation under the general railroads laws, and thereby has assumed all the burden thereof. If the *South Covington & Cincinnati Railway Company* now finds itself in difficulties, by reason of its contract with the *Cincinnati, Covington & Erlanger Railway Company*, it may by reason of the identity of management surrender the charter of the railway company and operate the line under the street railway charter. It might, if it deems it more convenient to do so, operate its cars over the right of way of the *Cincinnati, Covington & Erlanger Railway Company*, to the terminus in Covington, on Montague Street, or attach a separate car and then transfer its passengers to cars operating on the tracks of the *South Covington & Cincinnati Street Railway Company*.

It must be remembered also, that the Kentucky separate coach law also contains the following Section:

> Section 796. *No discrimination in coaches or compartments.* That the railroad companies, person or persons, shall make no difference or discrimination in the quality, convenience or accommodations in the cars or coaches or partitions set apart for white and colored passengers.

Counsel has cited the case of *Hall v. DeCuir*, 95 U. S., page 485. We submit this case is not in point at all. Here the Statute of Louisiana, provided that no discrimination should be made between white and colored passengers, in other words, that common carriers were forbidden to refuse admission to their conveyances, or expel therefrom any person whatsoever, except when there was no accommodation for those passengers, or except when they were disorderly, etc. The Supreme Court held the Statute unconstitutional and void, because it was an unreasonable interference with interstate commerce, in that it requires the master of a steamboat to segregate and separate the passengers, and not because it required the company operating the boat to provide suitable and proper accommodations for both races. This is perfectly clear from the following language:

> —congressional inaction left Bennet at liberty to adopt such reasonable rules and regulations for the disposition of passengers upon his boat, while pursuing her voyage into Louisiana, or without, as seemed to him most for the interest of all concerned. The statute under which this suit is brought, as construed by the State Court, seeks to take away from him that power so long as he is within Louisiana; and while recognizing to the fullest extent the principle which sustains a statute, unless its unconstitutionality is clearly

> established. We think this statute, to the extent that it requires those engaged in the transportation of passengers among the States to carry colored passengers in Louisiana in the same cabin with whites, is unconstitutional and void.

In the case of *Cleveland, Cincinnati, Chicago & St. Louis Railway Company v. Illinois*, 177 U. S., 514, this Court held upon the facts that the Statute of Illinois, requiring every railroad corporation to stop all regular trains at County Seats, was an unreasonable regulation of interstate commerce. This Court did say, however, that "the distinction between this Statute * * * * and other similar requirements, contributing to the safety, comfort and convenience of their patrons, is too obvious to require discussion."

The case of *Chesapeake & Ohio Railway Company v. Kentucky*, 179 U. S., page 388, we think is in point with the case at bar. This was an indictment brought under Section 795, of the separate coach law against the *Chesapeake & Ohio Railroad Company*. The company demurred upon the ground that the law was repugnant to the Constitution of the United States, in that it was a regulation of interstate commerce. The demurrer was overruled and the case tried by a jury, which found a verdict of guilty and fixed the fine at $500.00. The Court affirmed the conviction, which holding was affirmed by this Court. The Court said:

> Of course, this law is operative only within the state. It would be satisfied if the defendant, which operates a continuous line of railway from Newport News, Virginia, to Louisville, Kentucky, should take on its westward bound trains a separate coach or coaches for colored people at its first station in Kentucky, and continue the same

to Louisville; and upon its eastward bound trains take off such coach at the same station before leaving the state. The real question is whether a proper construction of the act confines its operation to passengers whose journeys commence and end within the boundaries of the state, or whether a reasonable interpretation of the act requires colored passengers to be assigned to separate coaches when traveling from or to points in other states.

The Court quoted from the case of *L. N. O. & T. R. Co., v. Mississippi*, 133 U. S., 587, where the construction of a similar statute was involved, as follows:

> So far as the 1st section is concerned (and it is with that alone we have to do), its provisions are fully complied with when to trains within the state is attached a separate car for colored passengers. This may cause an extra expense to the railroad company, but no more so than state statutes requiring certain accommodations at depots, compelling trains to stop at crossings of other railroads, and a multitude of other matters confessedly within the power of the state. No question arises under this section as to the power of the state to separate in different compartments interstate passengers, or to affect, in any manner, the privileges and rights of such passengers. All that we can consider is, whether the state has the power to require that railroad trains within her limits shall have separate accommodations for the two races. That affecting only commerce within the state is no invasion of the powers given to Congress by the commerce clause.

In this case, *Chesapeake & Ohio Railway Company v. Kentucky*, supra, the Court concluded with the finding of fact by the Court of Appeals of Kentucky, that the statute never applied to interstate business and quotes the Court of Appeals of Kentucky as follows:

If it were conceded (which is not) that the statute is invalid as to interstate passengers, the proper construction to be given it would then be that the legislature did not so intend it, but only intended it to apply to transportation within the state, and therefore it should be held valid as to such passengers. It seems to us that a passenger taking passage in this state, and railroad companies receiving passengers in this state, are bound to obey the law in respect to this matter, so long as they remain within the jurisdiction of the state.

This Court then goes on to say:

This ruling effectually disposes of the argument that the act must be construed to regulate the travel or transportation on railroads of all white and colored passengers, while they are in the state, without reference to where their journey commences and ends, and of the further contention that the policy would not have been adopted if the act had been confined to that portion of the travel which commenced and ended within the state lines. Indeed, it places the court of appeals of Kentucky in line with the supreme court of Mississippi, in *Louisville, N. O. & T. R. Co. v. Mississippi*, 66 Miss. 662, 5 L. R. A. 132, 2 Inters. Com. Rep. 615, 6 So. 203, which had held the separate coach law of that state valid as applied to domestic commerce. Granting that the last sentence from the opinion of the court of appeals, above cited, would seem to justify the railroad in placing interstate colored passengers in separate coaches, we think that this prosecution does not necessarily involve that question, and that the act must stand, so far as it is applicable to passengers traveling between two points in the state.

Indeed, we are by no means satisfied that the court of appeals did not give the correct construction to this statute in limiting its operation to domestic commerce. It is scarcely courteous to

impute to a legislature the enactment of a law which it knew to be unconstitutional, and if it were well settled that a separate coach law was unconstitutional as applied to interstate commerce, the law applying on its face to all passengers should be limited to such as the legislature were competent to deal with. The court of appeals has found such to be the intention of the general assembly in this case, or, at least, that if such were not its intention the law may be supported as applying alone to domestic commerce. In thus holding the act to be severable, it is laying down a principle of construction from which there is no appeal.

We believe that this finally disposes of the question. Of course, it is ably argued by counsel for plaintiffs in error, that many inconveniences would result from the enforcement of this law, but these are merely incidental to the enforcement of every law. Several of these inconveniences are suggested:

(a) That it would be impracticable to attach to the interstate cars, when they reach the Kentucky side of the state line, an additional car, and to detach it when reaching that line on the return trip. The reasons given are, that the point at the Suspension bridge, where these cars enter Kentucky, is a too densely populated part of the City of Covington, for the maintenance of necessary tracks and yards. It is not of course in the record that this is a densely populated community at this point. As a matter of common knowledge, the Court may assume that at this point it might be a matter of great convenience to the traveling public to attach a trailer for the convenience of local travel. Our suggestion is, that the law is fully complied with by the mere installation of a compartment in double truck cars, now commonly used, and, which so far

as this record shows, may be used on the lines of the plaintiffs in error, and the installation of compartments in these cars is a matter of no inconvenience at all. As suggested before, the *South Covington, & Cincinnati Street Railway Company* might run its cars to a point where they now connect with the lines of the *Cincinnati, Covington & Erlanger Railway Company*, and transfer at that point. The same objection that is made by the *Cincinnati, Covington & Erlanger Railway Company* in this case might well be made by any interstate railroad company.

(b) That if the separate coach or compartment were furnished, it would in practice directly affect interstate travel. It is suggested that a colored passenger entering a car in Cincinnati could not be assigned to the separate car, or compartment, in Ohio, and he could not be assigned at all because he was an interstate passenger. The Court of Appeals of Kentucky, in this case has expressly held that the separate coach law only applies to intra-state travel, and therefore it can not be assumed that a colored passenger getting on in Ohio would be affected at all. The only place where it is sought to enforce the operation of the statute is between the two termini of the *Cincinnati, Covington & Erlanger Railway Company* in Kentucky.

(c) That the Cincinnati, Covington and Erlanger Railway Company's line is operated as part of a street railway system. That the cars which are frequently interchanged back and forth on other parts of the same tracks are ordinary street cars.

In reply to this we say that these are merely some of the incidental and practical difficulties which are not impossible of solution. The Statute requires companies

operating coaches under railroad charters, to furnish separate compartments or coaches for white and colored passengers, and the *Cincinnati, Covington & Erlanger Railway Company*, can not be excused from complying with the law requiring it to provide separate coaches on its line operating exclusively in Kentucky, because of the fact that it has voluntarily entered into contracts and arrangements with other companies for the purpose of evading the law.

We respectfully submit that the judgment in each case should be affirmed.

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